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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

OPTIMUMPATH, L.L.C.,

Plaintiff,

vs.

BELKIN INTERNATIONAL, INC.,  
BUFFALO TECHNOLOGY (USA), INC.,  
CISCO-LINKSYS, LLC, COMPEX, INC.,  
D-LINK SYSTEMS, INC. NETGEAR, INC.  
AND SMC NETWORKS, INC.,

Defendants.

CASE NO. 4:09-CV-1398-CW

**PLAINTIFF OPTIMUMPATH, L.L.C.'S  
NOTICE OF MOTION AND MOTION TO  
AMEND THE COURT'S CASE  
MANAGEMENT ORDER**

Date: Thursday, November 19, 2009  
Time: 2:00 p.m.  
Room: Courtroom 2, 4th Floor  
Judge: Honorable Claudia Wilken

**NOTICE OF MOTION AND MOTION TO AMEND**

PLEASE TAKE NOTICE that on Thursday, November 19, 2009, before the Honorable  
Claudia Wilken in Courtroom No. 2, 4th Floor, 1301 Clay Street, Oakland, California, Plaintiff

OptimumPath, L.L.C. ("OptimumPath") will move, and hereby does move, amend certain claim construction deadlines as set forth in the Court's July 21, 2009 Case Management Order.

Specifically, OptimumPath moves to amend the following deadlines set forth in the Court's Case Management Order:

Deadline	Current Date	OptimumPath's Proposed Date
Exchange of Preliminary Claim Constructions and Preliminary Identification of Extrinsic Evidence (Pat. L.R. 4.2.a-b.1)	10/07/09	03/15/10
Joint Claim Construction and Prehearing Chart (Pat. L.R. 4.3)	11/06/09	04/15/10
Completion of Claim Construction Discovery (Pat. L.R. 4.4)	12/07/09	07/16/10

Considering the significant amount of time between the current deadlines above and the deadlines for claim construction briefing (*i.e.*, December 2010), OptimumPath asserts that the parties will be better served by extending the deadlines as proposed to allow additional time to obtain and fully consider the evidence pertinent to claim construction.

The extended deadlines requested by OptimumPath will not affect any other dates for this case, including the currently set February 17, 2011 claim construction hearing.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Introduction

OptimumPath respectfully moves the Court to amend certain deadlines related to claim construction in order to allow the parties to obtain and more fully consider evidence relating to the claim construction issues in this case. As it stands, the Parties are required to meet deadlines for the exchange of preliminary claim constructions, filing of the joint claim construction chart and completion of claim construction discovery within the next two months. Following that, however, there is a one year gap before Plaintiff's initial claim construction briefing is due on

December 2, 2010. Considering the upcoming holidays and the inherent disruption in the schedules of potential claim construction witnesses, OptimumPath asserts that the additional time it has requested would benefit the Parties as well as any claim construction witnesses. Any additional time would also allow the Parties to fully consider the impact of any claim construction discovery taken.

## **II. Statement of Issues to be Decided**

(1) Whether the Court may amend its Case Management Order to extend the deadline for compliance with certain claim construction deadlines.

## **III. Statement of Facts**

On July 14, 2009 the Court held a case management conference addressing, among other issues, the schedule for claim construction deadlines and briefing as well as the date for the claim construction hearing. On July 21, 2009 the Court entered a Case Management Order setting forth specific dates for compliance with Pat. L.R. 4-2 (a-b(1)), Pat. L.R. 4-3, Pat. L.R. 4-4 and claim construction briefing. Those dates are set forth below:

<b>Deadline</b>	<b>Date</b>
Exchange of proposed terms and claim elements for construction (Pat. L.R. 4.1.a-b1)	9/17/2009
Exchange of Preliminary Claim Constructions and Preliminary Identification of Extrinsic Evidence (Pat. L.R. 4.2.a-b.1)	10/07/09
Joint Claim Construction and Prehearing Chart (Pat. L.R. 4.3)	11/06/09
Completion of Claim Construction Discovery (Pat. L.R. 4.4)	12/07/09
Plaintiff to file opening brief re claim construction	12/02/10
Defendants' opposition [to plaintiff's opening brief]	12/23/10

The Parties have already complied with Pat. L.R. 4-1(a) and (b).

On October 7, 2009, the parties filed a joint motion seeking an extension of time to comply with the October 7<sup>th</sup> deadline for exchanging preliminary claim constructions and

identifying extrinsic evidence. At that time, the Defendants had proposed only an extremely short extension of the deadlines and OptimumPath had offered a counterproposal as follows:

Deadline	Current	Defendants' Proposal	OptimumPath's Proposal
Parties to exchange Preliminary Claim Constructions and Extrinsic Evidence	10/07/09	10/15/09	03/15/10
Parties to file Joint Claim Construction and Prehearing Statement	11/06/09	12/15/10	04/15/10
Completion of Claim Construction Discovery	12/07/09	01/22/10	07/16/10

On October 12, 2009, Defendants informed OptimumPath that they would not agree to its proposal and again made a take-it-or-leave-it offer to extend the deadlines as the Defendants had originally proposed. OptimumPath declined the offer and now files this motion.

#### **IV. Argument and Authorities**

The Court has the inherent power to control its docket. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, No. C 08-01023 JSW, 2009 U.S. Dist. LEXIS 27461 at \*4 (N.D. Cal. March 23, 2009). Here, OptimumPath is simply asking the Court to amend the current Case Management Order to allow the parties additional time to complete and comply with the deadlines for certain claim construction-related issues.

As an initial matter, there is no prejudice to any Defendant that would result from the modifications OptimumPath requests. Any changes proposed by OptimumPath will work to the benefit of both the plaintiff and the defendants. In addition, the dates now proposed by OptimumPath would not shorten the time for the Defendants to comply with any deadline. To the contrary, OptimumPath's proposal would allow all the parties to conduct full and fair discovery regarding claim construction and would also allow all parties ample time to fully consider any evidence collected.

1 The amendments proposed by OptimumPath would also allow discovery to take place  
 2 after the holidays. OptimumPath expects that depositions of the parties and/or certain third-  
 3 parties may be necessary during claim construction discovery. Currently, claim construction  
 4 discovery ends December 7, 2009. OptimumPath proposes extending this deadline until July 16,  
 5 2010 to coincide with the close of fact discovery. This extended deadline would relieve the  
 6 necessity of completing claim construction discovery prior to year end and would still leave four  
 7 months before Plaintiff's opening claim construction brief is due.  
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 10 V. Conclusion

11 For the reasons set forth above, OptimumPath respectfully requests that the Court grant its  
 12 motion to extend the deadlines for compliance with the above identified claim construction  
 13 deadlines.  
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15 Respectfully submitted,  
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 18 Date: October 13, 2009

18 /s/ Edward W. Goldstein  
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6 *Attorneys for Plaintiff OptimumPath, L.L.C.*

7 **CERTIFICATE OF SERVICE**

8 I hereby certify that on September 23, 2009, I electronically filed the foregoing document  
9 with the Clerk of the Court using this court's CM/ECF system, which will automatically send e-  
10 mail notification of such filing to all counsel who have entered in an appearance in this action.  
11 Pursuant to General Order 45(IX)(A), the e-mail notification constitutes service to those counsel  
12 of record.

13 /s/ Edward W. Goldstein  
14 Edward W. Goldstein  
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UNITED STATES DISTRICT COURT  
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OPTIMUMPATH, L.L.C.,

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BELKIN INTERNATIONAL, INC.,  
BUFFALO TECHNOLOGY (USA), INC.,  
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D-LINK SYSTEMS, INC., NETGEAR, INC.  
and SMC NETWORKS, INC.,

Defendants.

CASE NO. 4:09-CV-1398-CW

**JURY TRIAL DEMANDED**

**[PROPOSED] ORDER GRANTING MOTION TO MOTION TO AMEND**

**THE COURT'S CASE MANAGEMENT ORDER**

CAME FOR CONSIDERATION Plaintiff's Motion to Amend the Court's Case Management Order. After consideration, the Court finds the Motion should be GRANTED.

IT IS THEREFORE ORDERED that the following deadlines in the Court's Case Management Order be amended as set forth below:

<u>Deadline</u>	<u>Amended Date</u>
Exchange of Preliminary Claim Constructions and Preliminary Identification of Extrinsic Evidence (Pat. L.R. 4.2.a-b.1)	03/15/10
Joint Claim Construction and Prehearing Chart (Pat. L.R. 4.3)	04/15/10
Completion of Claim Construction Discovery (Pat. L.R. 4.4)	07/16/10